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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1095

In the Matter of the Application of THE CITY OF NEW YORK relative to acquiring title to certain real property designated as Lot 10 in Block 439 etc. (5 parcels, Manhattan)—FIFTH AVENUE COACH LINES, INC., and four other proceedings.

FIFTH AVENUE COACH LINES, INC.,
SURFACE TRANSIT INC.,
Appellants,

v.

THE CITY OF NEW YORK,
Respondent.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS

J. LEE RANKIN,
Corporation Counsel,
Attorney for Appellee,
Municipal Building,
New York, N. Y. 10007.

MORRIS HANDEL,
MORRIS EINHORN,
of Counsel.

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SURFACE TRANSIT INC.,

Appellants,

v.

THE CITY OF NEW YORK,

Respondent.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

MOTION TO DISMISS

Respondent, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves for dismissal of the appeal on the grounds that (1) it does not present a substantial federal question, (2) the judgment rests on an adequate non-federal basis, and (3) the question sought to be reviewed was not properly raised or expressly passed on.

Questions Presented

1. Whether a State statute (New York General Municipal Law, § 3-a), which reflects the relative safety of public

debts by prescribing lower interest rates on condemnation awards than are generally prevalent with respect to private debts, violates due process under the Fourteenth Amendment, particularly where such statutory rates are deemed by State courts to create no more than a rebuttable presumption as to the adequacy of just compensation for delay in payment?

This Court has previously sustained the statute under attack. *A.F. & G. Realty Corp.* v. *City of New York,* 313 U. S. 540 (1941); *aff'g Matter of City of N. Y. (Bronx River Parkway),* 284 N. Y. 48, 701 (1940).

The Question Presented, as posed by Appellants' Jurisdictional Statement (p. 3), erroneously states that the State courts "precluded" appellants from showing that the statutory rate of interest was inadequate.

2. Where the State courts have found, on the evidence presented, that a statutory rate of interest on condemnation awards affords just compensation for delay in payment, is a federal due process question under the Fourteenth Amendment presented?

3. Where a State statute, which creates a rebuttable presumption that 4% interest on a condemnation award affords just compensation for delay in payment, is challenged in this Court as repugnant to due process of law under the Fourteenth Amendment, has that question been properly presented where neither the Federal Constitution nor any provision thereof was expressly invoked and it is simply contended at the trial that such interest rate affords "inadequate compensation as a matter of law and as a matter of fair constitutional rights" (13,550)?*

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* The pages of the record are referred to herein by numbers in parentheses. Appendices referred to are contained in appellants' Jurisdictional Statement.

Statement

This is an appeal from a judgment awarding appellants $30.4 million, plus interest at 4% per annum, for the tangible assets of their bus operations (buses, garages, land, and personalty).

Appellants' property was condemned in March, 1962. Their bus operations in the City of New York had been sustained for years by means of public subsidies to enable them to compete with City-owned rapid transit and bus systems. The award for the value of appellants' property, as originally made by the Trial Court and affirmed by the Appellate Division, embraced all of the property, *i.e.,* inclusive of claimed intangible assets. The $30.4 million award had been predicated entirely upon the *depreciated reproduction cost of the physical assets,* despite *a net investment rate base* of $18.9 million (Appendix E, p. E-16) and a sales value of $20.7 million (Appendix D, p. D-6). The Court of Appeals nevertheless found that award inadequate because it presumably did not admeasure "going-concern value" separately, and in addition to the physical property, and remanded the case for a separate determination thereof.* This, despite the fact that the condemned bus fleets, because of age and debilitated condition, "were incapable of efficient operation," thus requiring multi-million dollar rehabilitation expenditures (Appendix E, p. E-55), as well as additional huge expenditures to meet past incurred, but totally unfunded, pension liability for active personnel (Appendix E, pp. E-72, E-73).**

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* While the valuation issues, and legal questions incident thereto, will not be finally resolved until the pending litigation on "going concern value" is completed, respondent raises no question as to the finality of the judgment for purposes of this appeal on the adequacy of compensation for delay in payment.

** Portions of the record, on both the trial and the retrial, not certified to this Court on the present appeal, show that a minimum of $50 million was required to rehabilitate the condemned property and $58 million to meet past accrued pension fund deficiencies for active personnel.

The statement of some of these background details concerning the basic award, although seemingly irrelevant to the limited issue here presented as to the adequacy of the interest rate, has been necessitated by appellants' attempt to have their pre-condemnation liabilities, for which compensation has been denied, treated as a factor in determining just compensation for delay in payment. Thus, while appellants state that "[a]ll evidence offered by claimants to show that interest of 4% per annum on the award was not adequate to compensate them for delay in payment was excluded" (Jurisdictional Statement, p. 5), the fact is that appellants simply chose to introduce no evidence—although urged by the condemnor to do so if they would preserve an appealable issue (*infra*, p. 7). As a "substitute" for such record proof, appellants inject the extraneous allegation that they were "required" to discharge $19.5 million in "liabilities attributable to their operations as going concerns prior to condemnation," and set forth an itemized list of those alleged liabilities (Jurisdictional Statement, p. 5 fn.). Inasmuch as pre-condemnation liabilities are not assets of value to be reflected in an award for the value of property, and since, on the retrial of the issue of going concern value, appellants are even now urging $19.5 million as "a minimum measure of the value of claimants' going concern assets" (Appellants' Trial Brief, p. 78), appellants' liabilities in that *alleged amount* are clearly irrelevant to the issue presented on the adequacy of interest for delay in payment of the basic award.*

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* The Trial Court's consideration of appellants' claimed liabilities is set forth in Appendix E, pp. E-72 to E-80, and Appendix F, p. F-8.

ARGUMENT

This Court has previously upheld the constitutionality of the statute under attack. The appeal raises no substantial federal question, the judgment appealed from rests on an adequate non-federal basis, and the question was not properly raised or expressly passed on.

(1)

Where property is taken in eminent domain, "it has consistently been held that the Fifth Amendment's reference to 'just compensation' entitles the property owner to receive interest from the date of the taking to the date of payment as part of his just compensation (cases cited)." *United States* v. *Hotel Co.*, 329 U. S. 585, 588 (1947); see also, *Albrecht* v. *United States*, 329 U. S. 599, 602-3 (1947). This Court has already upheld the constitutionality of the statute here under attack (New York General Municipal Law, § 3-a), which affords 4% interest for delay in payment of a condemnation award pending judicial determination of the condemned property's value. Thus, the New York Court of Appeals, in construing the statute, has held that "the lower rates of interest usually applicable" to the borrowings of public debtors are adequate to afford just compensation pending payment of an award. *Matter of City of N. Y. (Bronx River Parkway)*, 284 N. Y. 48, 54-5 (1940); 284 N. Y. 701 (1940), amending remittitur to present questions under the Fourteenth Amendment. This Court affirmed, *sub nom. A. F. & G. Realty Corp.* v. *City of New York*, 313 U. S. 540 (1941), and rejected the contention that the statute violated the Equal Protection and Due Process provisions of the Fourteenth Amendment.

The New York Court of Appeals did not hold in the cited case, nor is it the law in the State of New York, as appellants baselessly contend, that the statutory rate is conclusive and precludes evidence of an appropriate interest rate. The statute has been held to provide, at best, "a rebuttable presumption" as to the adequacy of the rate

therein set forth, and appellants concede this to be an appropriate function of such legislation (Jurisdictional Statement, p. 5). Thus, in the cited leading case, the State Court of Appeals expressly held that evidence as to the inadequacy of the statutory rate could overcome the presumption created thereby, and that only "[i]n the absence of evidence as to what such additional sum should be, interest, as provided by law, meets the constitutional requirement." *Matter of City of N. Y. (Bronx River Parkway), supra,* 284 N. Y. at p. 54. The Court had there expressly pointed out that the "claimants' contention that interest at the rate of four per centum per annum is so unreasonably low as to deprive them of just compensation is not supported by any evidence, and is contrary to common experience" (*ibid.,* at p. 55).

In short, the factual question as to just compensation for delay in payment is not preempted by the statute under attack. This was expressly and recently recognized in *Mtr. of City of N. Y. (Maxwell),* 15 AD 2d 153, 178, 181 (1st. Dept., 1961), aff'd *sub. nom. Matter of City of New York (Schnurmacher Corp.),* 16 NY 2d 497, 828 (1965), rearg. den. 16 NY 2d 834 (1965). It is the opinion in that case to which appellants attribute the Trial Court's alleged error (Jurisdictional Statement, pp. 6-7) in "precluding" them "from showing that actual loss exceeded the statutory rate" (*ibid.,* p. 5). In the *Maxwell* case, however, the Appellate Division found that the higher cost of money to *private debtors,* as opposed to governmental debtors, even "if proven, would not overcome the presumptive applicability of section 3-a." The Court held that the statutory rate "reflects a reasonable balance between return and safety," and that there had been "no offer of proof that the 4% rate unduly favors" municipalities (15 AD 2d, at pp. 181-182). It had not there been shown that the cost of money to municipalities exceeded the statutory rate. As the Court stated, "[c]laimants do not even hint that the municipality, which is the condemnor herein, procured benefits of this nature" (*ibid.,* at p. 182).

The plain fact is that "evidence as to what such additional sum should be" for delay in payment of an award was and is clearly admissible under the law of the State of New York. *Matter of City of N. Y. (Bronx River Parkway), supra.* However, appellants introduced no such evidence. Appellants merely *offered to prove* that the cost of money to them exceeded 4%, that penalty interest on tax delinquencies exceeded 4%, that the cost of money to other private borrowers exceeded 4%, and that "on tax exempt municipals, and on some forms of U. S. Treasury bonds" the interest rate exceeded 4% (13,555-60). Even the offer of proof contained no specifics on the interest paid on the designated government securities. Far from being "precluded" from introducing proof of these alleged facts (Jurisdictional Statement, pp. 3, 4, 5, 12), appellants simply precluded themselves because they could not meet their burden of proof. Indeed, the respondent raised no objection to the actual introduction of appellants' proof, subject only to the right of cross-examination and countervailing proof.

It was the City that, in fact (a) urged upon appellants that they "are entitled under the Lincoln Square and Bronx River Expressway cases to come in with evidence of what a just rate of compensation would be" for delay in payment (13,552), (b) cautioned appellants that without proof of an appropriate rate to be added to the award, appellants "will not have an appealable grievance," and (c) that "the time to establish that grievance is in the court of original jurisdiction" (13,568-9). Appellants conceded that they had merely advanced "a statement of what would be offered in the event that there might be a favorable determination and a remand," and "that this is not proof" (13,553).

In addition, upon the remand by the Court of Appeals "for a determination of the value of the going concern assets as an addition to the amount heretofore awarded" (Appendix B, p. B-9), the retrial was completed without *even an offer to prove* that the statutory rate afforded inadequate compensation for delay in payment. Appellants plainly seek to make their trial record in this very Court. Thus, appellants ask this Court to take judicial notice of

evidence supplied by condemnees in other cases (Jurisdictional Statement, p. 11, citing "Exhibit EA-1 from the *Trans-Hudson* case"), and to judicially notice "that the City of New York has borrowed money at the following rates during 1966," *i.e.*, at rates ranging from 4.18% in January to 4.76% in October (*ibid.*, p. 13). In fact, the clear admissibility of such proof in the courts of the State of New York—when the detailed proof is actually tendered—is apparent from the very illustration invoked by appellants themselves. Thus, in the *Trans-Hudson* case to which appellants refer, the Trial Court found that "[o]f the several years involved here, the proof is satisfactory only as to the year 1966 in establishing the statutorily prescribed 4% interest rate to be unjust." Nevertheless, this was not sufficient to show inadequate compensation for the total period of delay in payment even in that case (*Mtr. of P. A. Trans-Hudson Corp.* v. *H. & M.*, 50 Misc 2d 613, 616 [Sup. Ct., N. Y. Co., 1966], modified 27 AD 2d 32 [1st Dept., 1966]; Jurisdictional Statement, p. 9).

In the instant case, the City pointed out to the Trial Court that appellants' secured creditors, with liens on appellants' real estate and buses, were themselves claimants in the condemnation proceeding, so that their claims were subject to the statutory rate absent proof of its inadequacy (13,581; *cf.* 13,555-8). Consequently, appellants' offer to prove that they would pay such claimants more than the statutory rate during the delay in payment of the award was scarcely of probative worth. Moreover, despite the fact that the City regarded appellants' method of "proof" to be grossly deficient and entitled to no weight whatever, it nonetheless pointed out that adequate compensation for delay in payment of a debt pending its determination was entirely dependent upon the period of delay and the return commonly required for the risk that attaches to the debtor (13,571-2). In brief, the City contended that the short-term obligations of government debtors should weigh heavily with the Court and that, as shown by the daily market quotations for short-term debts of government agencies, "none of them approach four per cent"

(13,573). The Trial Court concluded that "[t]he proof offered would not, in my opinion, overcome the presumptive applicability of Section 3-a and establish that the four per cent rate unduly favors municipalities" (13,582). *Cf. Hartford National Bank and Trust Co.* v. *E. F. Drew & Co.*, 188 F. Supp. 347, 349-50 (D. C., D. Del., 1960), aff'd 290 F. 2d 589 (C. A. 3d, 1961).

On the basis of the record that appellants chose to make in the instant case, without any objection from the condemnor or the Court as to the admissibility of proof in support of any theory deemed appropriate by appellants, the Trial Court's finding of fact as to the adequacy of compensation for delay in payment of the award presents no substantial federal question. *Joslin Co.* v. *Providence*, 262 U. S. 668, 677 (1923); *Matter of City of N. Y. (Bronx River Parkway)*, 284 N. Y. 48, 701 (1940), aff'd *sub. nom. A. F. & G. Realty Corp.* v. *City of New York*, 313 U. S. 540 (1941); *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311 (1902); *Zucht v. King*, 260 U. S. 174, 176 (1922); *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952).

(2)

To obscure the fact that they had provided no evidentiary basis for any finding as to the inadequacy of the statutory rate, appellants repeatedly charge that there had been a "holding that New York General Municipal Law § 3-a * * * precluded Appellants from showing that the said 4% statutory interest rate would not compensate them for the delay in payment of the award" (Jurisdictional Statement, p. 3; also, pp. 4-5). Appellants conclude that "[t]he holding by the New York Court of Appeals herein that the New York General Municipal Law § 3-a * * * precludes a showing of actual damages for delay in payment is in direct contravention of its constitutional duty" (Jurisdictional Statement, p. 12).

Far from having thus "contravened" its constitutional duty, or having reversed its prior ruling in *Matter of City*

of N. Y. (Bronx River Parkway), supra, as appellants would have this Court believe, appellants' baseless contention simply seeks to becloud the fact that the Court of Appeals' affirmance of the adequacy of compensation for delayed payment in this case was wholly predicated upon adequate non-federal grounds, namely, that appellants' "proof" was insufficient to overcome the presumptive applicability of the statute.* *Murdock* v. *City of Memphis,* 20 Wall. (87 U. S.) 590 (1874); *Lynch* v. *New York,* 293 U. S. 52, 54-55 (1934); *Fry Roofing Co.* v. *Wood,* 344 U. S. 157, 160 (1952); see *Stern & Gressman, Supreme Court Practice,* §§ 3-31, 3-32 (3d Ed., 1962), pp. 105-108. It is for this reason that in their motion to amend the remittitur so as to finalize the award, prior to retrial on the issue of going concern value, appellants made no request for clarification of the grounds of decision on the adequacy of compensation for delayed payment, as had been expressly done, for example, in *Matter of City of New York (Schnurmacher Corp.),* 16 NY 2d 828 (1965). See *Herb* v. *Pitcairn,* 324 U. S. 117, 128 (1945); STERN & GRESSMAN, *op. cit. supra.* § 3-29, pp. 102-104.

(3)

Appellants assert that their attack upon the statute as repugnant to due process under the Fourteenth Amendment

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*That the New York Court of Appeals repudiates any legislative prescription of just compensation was made quite evident when the Court, in this very case, expressly stated that the legislature had no right "to say what compensation shall be paid, or even what shall be the rule of compensation" (Appendix B, p. B-1). Thus, despite a net investment rate base of $18.9 million (Appendix E, p. E-16), heavy reliance upon City subsidies for an "earning capacity" (Appendix B, p. B-14), and a total value of $21.6 million for the entire enterprise as a *profitable entity* pursuant to the capitalization of earnings method suggested by the Legislature (N. Y. Condemnation Law, § 5-a; L. 1952, ch. 508, § 1), the lower Courts fixed the award at $30.4 million for an enterprise found *lacking in earning capacity* (Appendix D, p. D-2). The Court of Appeals held that award adequate for the physical property alone, remanding the case for retrial on the question of intangible or going concern value.

"was raised before, and rejected by, each of the lower courts" (Jurisdictional Statement, p. 3). The fact is that when the issue as to compensation for delay in payment was presented in the Trial Court, appellants did not contend that General Municipal Law, § 3-a, was repugnant to the Constitution of the United States. Appellants simply urged upon the Trial Court that, if it awarded no more than four per cent for delay in payment, it would constitute "inadequate compensation as a matter of law and as a matter of fair constitutional rights" (13,550). It is respectfully submitted that, particularly when a statute previously sustained by this Court on the constitutional grounds here urged (284 N. Y. 701) is again attacked as violative of the Fourteenth Amendment, an express and specific identification of the federal question allegedly being raised must be made if a Trial Court is to be expected to consider the question anew. *New York Central R'd Co.* v. *New York*, 186 U. S. 269, 272-3 (1902); *Bryant* v. *Zimmerman*, 278 U. S. 63, 67-68 (1928); *Ford Motor Co.* v. *Pace*, 364 U. S. 444 (1960); Revised Rules of the Supreme Court of the United States, Rules 15, subd. 1 (d), 23, subd. 1 (f); see STERN & GRESSMAN, *op cit. supra*, § 3-26, pp. 92-93; § 3-27, pp. 94-95; § 5-21, p. 198.

CONCLUSION

The motion to dismiss the appeal from the judgment of the New York Court of Appeals should be granted.

March 16, 1967.

Respectfully submitted,

J. LEE RANKIN,
Corporation Counsel,
Attorney for Respondent,
Municipal Building,
New York, New York 10007

MORRIS HANDEL,
MORRIS EINHORN,
of Counsel.